SUPREME COURT, U. S.

FILED

NOV 19 1968

JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

_____ TERM

NO. 757

FREDDIE JOE WELCH and PAUL L. TUGWELL,

Petitioners,

v.

GERALD B. LEAVEY, Deputy Commissioner, ET AL,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO REVIEW DECISION OF THE FIFTH CIRCUIT COURT OF APPEALS

W. JILES ROBERTS

617 Americana Building
Houston, Texas 77002

Attorney for Petitioners

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IN THE

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FREDDIE JOE WELCH and PAUL L. TUGWELL,

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v.

GERALD B. LEAVEY, Deputy Commissioner, ET AL,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO REVIEW DECISION OF THE FIFTH CIRCUIT COURT OF APPEALS

FREDDIE JOE WELCH and PAUL L. TUGWELL, Petitioners, petition that writ of certiorari issue to review the Judgment of the Fifth Circuit Court of Appeals entered in the above entitled cause on

the 10th day of July, 1968, and its Order refusing Rehearing dated August 21, 1968.

A. Reference to Official and Unofficial Reports of Opinions Delivered by Courts Below

The opinion of the Fifth Circuit Court of Appeals is reported at 397 F.2d 189, the opinion is set forth in Appendix C, pages 17a-25a. The Order overruling Petition for Rehearing, not published, appears in Appendix E, pages 35a-36a. There was no written opinion by the district court. The Order of the Deputy Commissioner of Labor In Re Freddie Joe Welch, not published, is set forth in Appendix B, pages 8a-16a. The Order of the Deputy Commissioner of Labor In Re Paul L. Tugwell, not published, appears in Appendix A, pages 1a-7a.

B. Statement of Grounds on Which the Jurisdiction of This Court is Invoked

(i) The date of the Judgment or Decree of the Fifth Circuit Court of Appeals sought to be reviewed is July 10, 1968 (Petition for Rehearing denied August 21, 1968; see ii below), which is a review of the Judgment of the District Court dated September 13, 1966, from which timely appeal was taken, which is a review of the Order of the Deputy Commissioner of Labor In Re Welch dated October 13, 1965, from which timely appeal was taken, and In Re Tugwell dated

November 4, 1965, from which timely appeal was taken, each of which Orders was entered on the dates heretofore set forth.

(ii) The date of the Order denying Petition for Rehearing is August 21, 1968. There has been no Order granting an extension of time within which to Petition for Writ of Certiorari.

(iii) The statutory provisions believed to confer jurisdiction on this Court to review the Judgment or Decree in question by Writ of Certiorari are Rule 19 1.(b), Supreme Court Rules, and 28 U.S.C. 1254(1), and it is filed within the time allotted by 28 U.S.C. 2101(c) and Rule 22(1), Rules of the Supreme Court.

C. Question Presented for Review

May the Deputy Commissioner of Labor in entering a formal Order ruling on a claim for compensation for permanent partial disability under the Longshoremen's and Harbor Workers' Compensation Act, where he finds as a fact that the claimant is permanently and partially disabled by reason of injury covered under the Act, deny compensation because the longshoreman is earning more money in his disabled condition subsequent to injury than his pre-injury earnings?

(a) Does he have to make specific findings as to whether or not the long-

shoreman's post injury earnings fairly and reasonably represent the longshoreman's wage earning capacity and are the present findings adequate in the orders complained of by Petitioners?

D. The statutes involved are 33 U.S.C. 908, printed in Appendix D, pages 26a-34a, and 33 U.S.C. 902(10) and (13) is printed in Appendix F, page 37a.

E. Statement of Case

This Petition for Writ of Certiorari brought by Petitioners Freddie Joe Welch and Paul L. Tugwell arises out of respective injuries sustained by each of the Petitioners while employed as longshoremen for their respective employers out of which each of such employees sustained injuries resulting in permanent partial disability, not less than five per cent (5%) nor more than ten per cent (10%) to the body as a whole as to Freddie Joe Welch, and twenty per cent (20%) to the body as a whole as to Paul L. Tugwell, each occurring by reason of spinal injuries. Claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act was made and formal hearing had in each case. Compensation for temporary disability was allowed in each case, and compensation for permanent partial disability was denied on the grounds that each of Petitioners had earned more money subsequent to the date of allowance of compensation for temporary disability than they had

earned prior to injury, without a finding of any change in their physical condition at or near the respective dates at which he terminated their right to compensation for temporary disability and denied their claim for compensation for permanent partial disability even though he found that the claimed permanent partial disability did in fact exist. See Appendix B, pages 8a-16a, In Re Welch, and Appendix A, pages 1a-7a, In Re Tugwell. (Federal jurisdiction arises by virtue of 33 U.S.C. 901-950.) Petitioners appealed to the district court within the time allotted as authorized by 33 U.S.C. 921, the basis of federal court jurisdiction in the first instance, alleging that the respective orders should be set aside because: (1) the orders failed to award compensation for permanent ent partial disability found; (2) that there was no finding that Petitioners' actual wages subsequent to date of termination of compensation for temporary disability fairly and reasonably represented their respective wage earning capacities when compared to their respective pre-injury wage earning capacity and that any finding other than the disabilities having caused a reduction in wage earning capacity would be contrary to the finding of permanent partial disability and not supported by substantial evidence; (3) the Deputy Commissioner failed to use a proper standard in denying Petitioners' claim for compensation for permanent partial disabilities. The district court upheld the Deputy Commissioner and Petitioners appealed to the

Court of Appeals for the Fifth Circuit within the allotted time making essentially the same contentions. Following an adverse decision (see Appendix C, pages 17a-25a, and Petition for Rehearing Denied, Appendix E, pages 35a-36a), this Petition follows.

F. Argument and Reasons for Granting the Writ

1. This Petition involves the construction of 33 U.S.C. 908(c) (21) as it is affected by 33 U.S.C. 908(h) which was added by amendment in 1938, which is an important question of federal law which should be settled by this Court and is believed to be in conflict with the Opinion of the Fourth Circuit in Ennis v. O'Hearne, 223 F.2d 755, and the Second Circuit in Travelers Insurance Company v. McClellan, 288 F.2d 250, insofar as it relates to the allowance of compensation for permanent partial disability to the longshoreman for injuries governed by 33 U.S.C. 908(c) (21) inasmuch as each of these decisions clearly upholds the right of the injured longshoreman to compensation for permanent partial disability. It is further believed that the decision below is contrary to the decision of this Court requiring specific findings by administrative hearings and officers. See Automatic Canteen Company v. Federal Trade Commission, 73 S.Ct. 1017, 1028; 346 U.S. 61, 81.

2. Prior to the amendment in 1938, cases of general disability (not invol-

ving injuries to specific areas of the person's body such as the loss of an arm, hand, eye, etc., which is covered by 33 U.S.C. 908(c) 1 through 20) were compensated under 33 U.S.C. 908(c) (21); subsection 21 providing for compensation for other cases of permanent partial disability to be 66 and 2/3 per cent between his average weekly wages prior to injury, that is, wage earning capacity thereafter in the same or other employment. See 33 U.S.C. 902(10) set forth in Appendix F, page 37a, defining disability. Wages are defined as the money rate which the service rendered is recompensed under the contract of hiring in force at the time of the injury, etc. See 33 U.S.C. 902(13) set forth in Appendix F, page 37a. These were the definitions as the Act was enacted in 1927. As can be seen, there was no statutory provision for the Deputy Commissioner to allow compensation when the employee was permanently partially disabled under 33 U.S.C. 908(c) (21), for such an injury as sustained by Petitioners, when his earnings in his disabled condition were as high or higher than they were prior to injury. As a result of this, at the request of the Department of Labor, which is charged with the administration of the Act, Congress enacted in 1938 by amendment 33 U.S.C. 908(h) set forth in Appendix D, pages 26a-34a (see Legislative History set forth in Appendix G, pages 38a-47a), which required the Deputy Commissioner to use the employee's actual earnings

in passing on claims such as those of Petitioners, if such earnings fairly and reasonably represent his wage earning capacity. This manifested an intent on the part of Congress that where the employee was permanently and partially disabled other than by specific injuries (for which compensation for permanent partial disability was provided to be paid without regard to loss of earning capacity--it being effectively presumed), that unless his earnings, fairly and reasonably represented his wage earning capacity, then the Deputy Commissioner was required to award the employee compensation; this requires the Deputy Commissioner to make a determination as he did not in these cases, as to whether or not the wages received fairly and reasonably represented his wage earning capacity. Section (h) was added by amendment to prevent the many appeals that were going into Court because of the Deputy Commissioner's attempt to do this under 33 U.S.C. 908(c) (21). See Legislative History set forth in Appendix G, pages 38a-47a. The Deputy Commissioner in each of the cases denied compensation because of the post injury earnings of each of the Petitioners was higher than pre-injury earnings. See Appendix B, pages 8a-16a, for Welch and Appendix A, pages 1a-7a, for Tugwell. This begs the issue of whether the Petitioners' earnings fairly and reasonably represented their respective wage earning capacities. Their respective wage earning capacities of necessity must be related to their respective physical ability to work, and any impairment of

such physical ability, of necessity, affects their ability to earn wages.

3. In the absence of an allowance of some compensation, should either of Petitioners' conditions take a turn for the worse, and no one can really say that this will not happen, and a period of one year having elapsed as provided in 33 U.S.C. 922, they might then be met with the one year limitation and be unable to work and not receive compensation. See Pillsbury v. United Engineering Co., Ninth Circuit, 1951, 187 F.2d 987.

4. The Deputy Commissioner in denying compensation has failed to make the explicit findings as required under the Administrative Procedures Act. See Automatic Canteen Company v. Federal Trade Commission, supra, where this Court set forth the standard that the administrative hearing officer must meet in order that his order may be properly reviewed. In the case at hand, the administrative officer has not met these standards because he has failed to find specifically either that the subsequent earnings do or do not fairly and reasonably represent the Petitioners' wage earning capacity. The Deputy Commissioner was obviously more concerned over wages than the capacity to earn the wages; if one fails to compare capacity on one occasion to capacity on another occasion, then because of economic changes, etc., but only compares earnings to earnings, he will get a false impression as to

the effect of the injury on one's capacities to work and earn money. Without more specific findings, it is submitted that it is impossible to determine whether or not the Deputy Commissioner compared capacity to capacity or earnings to earnings. It is inconceivable from a practical standpoint to believe that the Deputy Commissioner could make any finding that would say on one hand that each of the Petitioners was permanently partially disabled by reason of a spinal injury resulting from the respective injuries in question, and yet on the other hand find that the subsequent earnings fairly and reasonably represented the Petitioners' wage earning capacity as it existed prior to the date of injury. This Court has heretofore held on at least two separate occasions that the Longshoremen's Act must be liberally construed in conformance with its purpose and in a way which avoids harsh results. See Reed v. Yaka, 83 S.Ct. 1349, 1353, 373 U.S. 410, 415, citing Voris v. Eikel, 346 U.S. 328, 333; 74 S.Ct. 88, 92. If the interpretation placed on the statute by the Deputy Commissioner by his order and upheld by the district court and the Fifth Circuit Court of Appeals is allowed to stand, it will cause harsh results, not only to Petitioners, but to other longshoremen sustaining injuries of a permanent partial character whose post injury earnings are as high or higher than prior to injury, especially when it is considered that had either of Petitioners (or any other longshoreman) lost an arm, leg, hand, toe, partial loss of hearing, loss of eyesight, or

sustained other specifically enumerated injuries, that without regard as to whether or not they lost one penny wages or without regard as to whether or not they made ten times as much money subsequent to the date of injury as to what their wages were prior to injury, they would be awarded compensation for their permanent disability of various amounts, such as an arm, 312 weeks, etc., in addition to any compensation for temporary total or temporary partial disability, whereas neither of Petitioners would be awarded any compensation for their permanent partial disability under the construction of the statute as followed by the Deputy Commissioner. It seems to obviously be in conflict with the purpose of the Act and the Legislative History of 33 U.S.C. 908(h) that was specifically enacted to allow compensation to be awarded under circumstances such as these.

WHEREFORE, premises considered, Petitioners pray that Petition for Writ of Certiorari be granted and that an Order issue to the lower court setting aside the Judgment and Order heretofore entered and directing that the Deputy Commissioner award compensation in accordance with the disability found and such other relief which Petitioners may show themselves justly entitled.

Respectively submitted,

(ORIGINAL SIGNED) W. JILES ROBERTS

W. JILES ROBERTS
617 Americana Building
Houston, Texas 77002
Attorney for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Petition for Writ of Certiorari have been served upon each of the following: Solicitor General, Department of Justice, Washington, D. C., 20530, and upon Mr. Charles Donahue, Solicitor of Labor, Washington, D. C., 20530, each by depositing two (2) copies in a United States Post Office or mailbox addressed to their Post Office address, Airmail, postage prepaid, and upon Mr. Morton Sussman, United States Attorney, 515 Rusk Avenue, Houston, Texas 77002, counsel for Respondent, Gerald B. Leavey, Deputy Commissioner; Royston, Rayzor & Cook, 877 San Jacinto Building, Houston, Texas 77002, counsel for Respondents Texas Employers' Insurance Association and Atlantic & Gulf Stevedores, Inc., and Young & Company of Houston, by depositing in a United States Post Office or mailbox the same to each of them, Airmail, United States Mail, postage prepaid, properly addressed to each of them at their respective Post Office addresses, this the 19 day of November, 1968.

(ORIGINAL SIGNED) W. JILES ROBERTS

W. JILES ROBERTS

APPENDIX A

UNITED STATES DEPARTMENT OF LABOR
BUREAU OF EMPLOYEES' COMPENSATION

EIGHTH COMPENSATION DISTRICT

In the matter of the claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act

PAUL L. TUGWELL, Claimant

vs.

YOUNG & COMPANY OF HOUSTON, Employer

TEXAS EMPLOYERS' INSURANCE ASSOCIATION
Insurance Carrier

COMPENSATION ORDER
AWARD OF COMPENSATION
CASE NO. 3136-417

Such investigation in respect to the above-entitled claim having been made as is considered necessary, and

A hearing having been duly held in conformity with law, The Deputy Commissioner makes the following

FINDINGS OF FACT

1. On July 12, 1958, the claimant above-named was in the employ of the employer above-named at Houston, Texas,

in the Eighth Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act. The liability of the employer for compensation under the said Act was insured by the Texas Employers' Insurance Association.

2. On the said day the claimant, while performing service as a longshoreman for the employer aboard the M/S "Pleasantville" upon the navigable waters of the United States, sustained injury resulting in disability. While tightening a guy line he slipped and fell on the deck of the vessel, causing injury and strain to the lower part of his back.

3. Written notice of injury was not given to the employer within thirty days, but the employer had knowledge of the injury and has not been prejudiced by the lack of such written notice. The employer furnished the claimant with medical treatment, etc., in accordance with the provisions of Section 7(a) of the said Act. The average weekly wage of the claimant at the time of injury was $146.36. He was paid full wages for day of injury.

4. As a result of the injury the claimant was wholly disabled from July 13, 1958, to October 18, 1958, inclusive, for which he is entitled to compensation for temporary total disability for 14 weeks at $54.00 per week, $756.00.

5. From October 19, 1958, to November 1, 1958, inclusive, 2 weeks,

the claimant's weekly earning capacity was reduced from $146.36 to $80.21, a loss of $66.15. For such disability he is entitled to compensation at $44.10 per week (66-2/3 percent of $66.15, his loss of earning capacity), in the sum of $88.20. (Emphasis Added)

6. As a further result of the injury to his back the claimant has permanent partial disability equivalent to 20 percent loss of use of the body as a whole, including such part thereof as may have been caused by aggravation to his pre-existing congenital anomaly. (Emphasis added)

7. Maximum improvement occurred on or about May 5, 1961.

8. The claimant has had the following earnings since his injury:

From November 2, 1958, to December 31, 1958, he earned $1,664.98, averaging $185.00 per week, or an excess of $38.64 per week above his average weekly wage prior to injury.

His earnings after December 31, 1958, were as follows:

For the year 1959, $10,790.41;
For the year 1960, $13,778.26;
For the year 1961, $12,262.74;
For the year 1962, $12,452.75;
For the year 1963, $12,344.67;
For the year 1964, $14,926.99;

The average weekly wage of the claimant for the consecutive six year period above shown was $245.37, or an excess per week of $99.01 above his average weekly wage of $146.36 prior to injury.

9. From January 1, 1965, to March 8, 1965 (less the seven week strike period) the claimant's average weekly wage was $230.04, or an excess of $83.68 per week above his average weekly wage prior to injury.

10. As a consequence of his record of substantially increased earnings since November 2, 1958, and in view of his positively demonstrated ability to earn wages in excess of his average weekly wage prior to injury, it is accordingly herewith determined that the claimant has sustained no loss of wage earning capacity as a consequence of his injury of July 12, 1958, within the meaning and intention of the Longshoremen's and Harbor Workers' Act.

11. At the hearing held in connection with this case before the Deputy Commissioner the employer and the insurance carrier entered a motion to dismiss the proceedings upon the grounds of "collateral estoppel" and "res judicata". The motion was predicated upon the fact that as a consequence of claimant's injury of July 12, 1958 a Third Party action had been instituted by the claimant in the United States District Court for the Southern District of Texas, during the course of which the jury found that no injury had been sustained by the claim-

ant "by slipping and falling upon the deck of the M/S 'Pleasantville' during the early morning hours of July 12, 1958." Judgment was entered, accordingly, in the District Court. The case was appealed to the United States Circuit Court of Appeals, Fifth Circuit, which upheld the judgment of the lower court.

12. The motion to dismiss this action before the Deputy Commissioner is herewith denied. It is considered that the doctrine of "collateral estoppel" and "res judicata" advanced by the employer and the insurance carrier as a bar to further proceedings here are inapplicable and should not prevent the claimant from pursuing his claim for compensation under the Longshoremen's and Harbor Workers Act.

13. Accrued compensation for temporary total and temporary partial disability amounts to $844.20. The employer and the insurance carrier have paid $844.20 to the claimant as compensation.

Upon the foregoing findings of fact the Deputy Commissioner makes the following

AWARD

The employer, the Young & Company of Houston, and the insurance carrier, the Texas Employers' Insurance Association, shall pay to the claimant compensation as follows: For temporary total disability from July 13, 1958, to October

18, 1958, inclusive, 14 weeks at $54.00 per week, $756.00; and partial disability from October 19, 1958, to November 1, 1958, inclusive, 2 weeks at $44.10 per week, $88.20; or a total of $844.20.

The employer and the insurance carrier having paid $844.20 to the claimant as compensation, the file of Paul L. Tugwell is herewith CLOSED, subject to the limitations of the Act.

Given under my hand and filed at Galveston, Texas, this 4th day of November, 1965.

/s/ Gerald B. Leavey

GERALD B. LEAVEY
Deputy Commissioner
Eighth Compensation District

PROOF OF SERVICE

I hereby certify that a copy of the foregoing Compensation Order was sent to the claimant, the employer and the insurance carrier at the last known address of each as follows:

By Registered Mail:

MR. PAUL L. TUGWELL 2630 Beverly, Box 583
Golden Acres, Texas

YOUNG & COMPANY OF HOUSTON	World Trade Bldg. Houston, Texas
TEXAS EMPLOYERS' INSURANCE ASSOCIATION	338 South Wayside Drive Houston, Texas

By Regular Mail:

Mr. W. Jiles Roberts, Attorney	617 Americana Bldg. Houston, Texas
Royston, Rayzor & Cook, Attorney	San Jacinto Building Houston, Texas
Bureau of Employees' Compensation	U. S. Department of Labor Washington, D. C. 20211

/s/ Gerald B. Leavey

GERALD B. LEAVEY
Deputy Commissioner

Mailed: November 4, 1965.

APPENDIX B

BUREAU OF EMPLOYEES' COMPENSATION

EIGHTH COMPENSATION DISTRICT

In the matter of the claim for compensation under the Longshoremen's and Harbor Worker's Compensation Act

FREDDIE JOE WELCH, Claimant

vs.

ATLANTIC & GULF STEVEDORES, INC.,
Employer
TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Insurance Carrier

COMPENSATION ORDER

AWARD OF COMPENSATION

CASE NO. 719-1490

Such investigation in respect to the above-entitled claim having been made as is considered necessary, and

A hearing having been duly held in conformity with law,

The Deputy Commissioner makes the following

FINDINGS OF FACT

1. On November 24, 1961, the claimant above-named was in the employ of the employer above-named at Houston, Texas, in the Eighth Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act. The liability of the employer for compensation under the said Act was insured by the Texas Employers' Insurance Association.

2. On the said day the claimant, while performing service as a longshoreman for the employer aboard the S/S "Loide Guatamala" upon the navigable waters of the United States, sustained injury resulting in disability. While working in the hold of the vessel he slipped on some fertilizer and at the same time was struck by the load being swung by the crane which knocked him to the floor. As a consequence he sustained a contusion to the left leg, and a strain in the lower part of his back.

3. Written notice of injury was not given to the employer within thirty days, but the employer had knowledge of the injury and has not been prejudiced by the lack of such written notice. The employer furnished the claimant with medical treatment, etc., in accordance with the provisions of Section 7(a) of the said Act. The average weekly wage of the claimant at the time of injury was $137.15.

4. As a result of the injury the claimant was never wholly disabled. He continued to work but remained partially disabled from November 24, 1961, to May 30, 1963, inclusive, 79 weeks. During said period his weekly earnings averaged $114.39, resulting in a loss of $22.76 per week ($137.15 less $114.39 is $22.76). For such disability he is entitled to compensation at $15.17 per week (66-2/3 percent of $22.76, his loss of wage earning capacity) in the sum of $1,198.43.

5. Maximum improvement was attained on May 30, 1963. On said date the claimant's condition changed from temporary partial disability to one of permanent partial disability determined to be not less than five percent nor in excess of ten percent for loss of use of the body as a whole. (Emphasis Added)

6. Subsequent to May 30, 1963, the claimant continued to work and sustained no loss of wages from said date to the date of this hearing. His weekly wages for said period averaged an amount in excess of his average weekly wage prior to his injury.

7. In consideration, therefore, of the claimant's demonstrated ability to earn wages during a substantial period of his disability, which were equal to or in excess of his average weekly wage prior to his injury, and considering the degree or percentage of his physical impairment, his usual employment, and other factors and circumstances which might affect his capacity to earn wages

in his disabled condition, including the effect of such disability as it may naturally be expected to extend into the future, it is determined that the claimant suffered no loss of wage earning capacity subsequent to May 30, 1963, as a consequence of his injury of November 24, 1961.

8. The employer and the insurance carrier submitted a motion to dismiss further proceedings in connection with this case, and to deny the claimant additional compensation under the Longshoremen's and Harbor Workers' Act. It is their contention that the statute of limitations has run, no formal claim having been filed by the claimant within one year from the date of last payment of compensation (July 22, 1962) in accordance with the provisions of Section 13 of the Act.

9. A formal claim, Form US-203, dated January 14, 1965, was filed in the office of the Deputy Commissioner, Eighth Compensation District, Galveston, Texas, on January 15, 1965.

10. During the one year period subsequent to the last date of payment of compensation, however, the claimant wrote or caused to be written in his behalf, two letters which are herewith quoted in their entirety. They were submitted as exhibits at the hearing and are attached to the transcript of the testimony thereof as Claimant's Exhibits Nos. 1 and 4, respectively:

CLAIMANT'S EXHIBIT 1

Freddie Joe Welch
709 McCardell
Channelview, Texas
August 22, 1962

Dear Sir:

In reference to case No. 719-1490, this is to inform you of permanent disability from the injury which I received.

Please advise me of the time of the meeting with the Commissioner.

Sincerely,

(a) Freddie Joe Welch
Freddie Joe Welch

CLAIMANT'S EXHIBIT 4

Freddie Joe Welch
709 McCardell
Channelview, TExas
September 19, 1962

Dear Sir:

On September 13, 1962, I had an appointment with Francis M. Dodson, Claims Examiner, regarding my case # 719-1490.

My notice of this hearing was somehow misplaced and not found until after

the set date. Could I please have another appointment regarding the above mentioned case.

Yours very truly,

(s) Freddie Joe Welch
Freddie Joe Welch

11. The wording of these two letters is such as to definitely identify the injury, and to make claim for "permanent disability". The letters indicate a desire and an intention upon the part of the claimant to negotiate with the carrier and with the Bureau of Employees' Compensation in regard to further prosecution of his claim for disability and that it was not his intention or desire that it lie dormant, but that he wished to take whatever steps were necessary to continue action in connection with the claim.

12. It is accordingly herewith determined that the correspondence herein set forth, referred to as Claimant's Exhibits No. 1 and No. 4, and specifically the letter of August 22, 1962 (Exhibit 4), constitutes a valid written claim for compensation by the claimant; that the said claim was filed within one year from the last date of payment of compensation; and that the claim served to tell the running of the limitation period in regard to time as set forth under Section 13 of the Longshoremen's and Harbor Workers' Act.

13. Accrued compensation for temporary partial disability to May 30, 1963, amounts to $1,198.43. The employer and the insurance carrier have paid to the claimant as compensation the sum of $906.34.

Upon the foregoing findings of fact the Deputy Commissioner makes the following

AWARD

The employer, the Atlantic & Gulf Stevedores, Inc., and the insurance carrier, the Texas Employers' Insurance Association, shall pay to the claimant compensation as follows: For temporary partial disability from November 24, 1961 to May 30, 1963, inclusive, 79 weeks at $15.17 per week, $1,198.43.

The employer and the insurance carrier having paid $906.34 to the claimant as compensation shall pay forthwith $292.09, whereupon the file of Freddie Joe Welch will be CLOSED, subject to the limitations of the Act.

An attorney's fee of $50.00 is approved in favor of W. Jiles Roberts, Attorney, for services rendered on behalf of the claimant, such sum to be a lien upon and be paid out of this award.

Given under my hand and filed at Galveston, Texas, this 13th day of October, 1965.

/s/ Gerald B. Leavey

GERALD B. LEAVEY
Deputy Commissioner

Eighth Compensation
District

PROOF OF SERVICE

I hereby certify that a copy of the foregoing Compensation Order was sent to the claimant, the employer and the insurance carrier at the last known address of each as follows:

By Registered Mail:

MR. FREDDIE JOE WELCH	709 McCardell Channelview, Texas
ATLANTIC & GULF STEVEDORES, INC	5513 Clinton Drive Houston, Texas
TEXAS EMPLOYERS' INSURANCE ASSN.	338 South Wayside Houston, Texas

By Regular Mail:

Mr. W. Jiles Roberts, Attorney	617 Americana Bldg. Houston, Texas
Royston, Rayzor & Cook, Attorneys	877 San Jacinto Bldg. Houston, Texas

Bureau of
Employees'
Compensation

U. S. Department
of Labor
Washington, D. C.
20211

/s/ Gerald B. Leavey

GERALD B. LEAVEY
Deputy Commissioner

Mailed: October 13, 1965.

APPENDIX C

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 24082

FREDDIE JOE WELCH and PAUL L. TUGWELL,

Appellants,

versus

GERALD B. LEAVEY, Deputy Commissioner, ET AL,

Appellees.

Appeals from the United States District Court for the Southern District of Texas

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(July 10, 1968)

Before JONES, WISDOM and THORNBERRY, Circuit Judges.

THORNBERRY, Circuit Judge: In these consolidated appeals, two longshoremen challenge the adequacy of the Commissioner's compensation award. 33 U.S.C. § 901 et seq. The case concerns the procedure that must be followed by the Commissioner in a partial-disability case in computing the impact of the injury on the worker's wage-earning capacity and the findings that must be made.

Appellant Tugwell was injured on July 12, 1958 when he slipped and fell while working on a ship. The Commissioner determined that as a result of the fall Tugwell suffered permanent-partial disability from an injury to the lower back.[1] He received a compensation award of $844.20 for the period

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[1] We reach Tugwell's compensation claim because we have determined in a companion case that he is not barred by collateral estoppel from seeking compensation under the Longshoremen's Act. See Young & Company v. Shea, 5th Cir. 1968, ____ F.2d ____ [No. 24249, ____, 1968]

from July 1 to November 1, 1958; however, his claim for continuing compensation was denied. It was shown that Tugwell was promoted to a walking foreman after his injury and that his after-injury wages were considerably higher than his pre-injury wages. Based on this fact and the medical testimony, the Commissioner concluded that appellant suffered no economic loss after November 1, 1958. He specifically found that appellant's record of substantially increased earnings and his positively demonstrated ability to earn higher wages indicated that he suffered no loss of earning capacity after that date.

Appellant Welch's injury occurred on November 24, 1961 when he slipped on some fertilizer and at the same time was struck by a load being swung by a crane which knocked him to the floor. He suffered a back injury from this mishap, but continued to work though he was partially disabled until May 30, 1963. The Commissioner concluded that although Welch was partially and permanently disabled he suffered no loss of earning capacity after May 30, 1963:

> In consideration, therefore, of the claimant's demonstrated ability to earn wages during a substantial period of his disability, which were equal to or in excess of his average weekly wage prior to his injuries, and considering the degree or percentage of his physical impairment,

> his usual employment and other factors and circumstances which might affect his capacity to earn wages in his disabled condition, including the effect of such disability as it may naturally be expected to extend into the future, it is determined that the claimant suffered no loss of wage-earning capacity subsequent to May 30, 1963, as a consequence of his injury of November 24, 1961.

Appellants contend that the Commissioner erred in failing to award compensation after these dates. We are convinced, however, that there is substantial evidence to support the holding that although Tugwell and Welch suffered permanent impairments from their injuries, they suffered no disability within the economic purview of the Longshoremen's Act after the dates set by the Commissioner.

In cases of permanent-partial disability, the statute dictates that for non-specific-member loss, the wage-earning capacity of the worker shall be the basis upon which compensation is awarded. Thus 33 U.S.C. § 908 (c)(21) is controlling:

> (21) Other Cases: In all other cases in this class of disability (permanent and partial) the compensation shall be 66 2/3 percentum of the difference between his average weekly wages

> and his wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of such partial disability, but subject to reconsideration of the degree of such impairment by the Deputy Commissioner on his own motion or upon application of any party in interest.

The Commissioner determines "wage-earning capacity" by following section 908(h) of the Longshoremen's Act:

> The wage-earning capacity of an injured employee... (1) shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity; (2) provided, however, that if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the deputy commissioner may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of the injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition including

> the effect of disability as it may naturally extend into the future.

It is well settled that this statutory framework commands the Commissioner to translate disability in a medical sense into economic disability within the meaning of the Act. Williams v. Donovan, E.D.La. 1964, 234 F.Supp. 135, aff'd 367 F.2d 825.

Appellants contend that when the Commissioner found they were partially and permanently disabled, he was required to enter an order providing for permanent compensation payments. Their position is spurious. The Commissioner cannot find that permanent physical disability has resulted in permanent economic disability unless he concludes that wage-earning capacity will always be adversely affected by the physical impairment. Stated differently, the statute does not allow an award for permanent-partial disability, aside from scheduled disabilities, unless there has been a loss of wage-earning capacity. This can be seen in the statutory definition of "disability"1 "incapacity because of injury to earn [thereafter] the wages which the employee was receiving at the time of injury." 33 U.S.C. § 902(10); Miller v. O'Hearne, D. Maryland 1960, 181 F.Supp. 105, 107.

Appellant's second attack on the compensation award seems to be that though wage-earning capacity is relevant,

the present order is not in accordance with law because the Commissioner employed an improper standard in determining their capacity. They argue that the Commissioner found no decrease in working capacity solely because after-injury wages were higher. As will be seen, it is only to the finding on Tugwell's claim that this objection is pertinent. As to Tugwell, the Commissioner found that as a consequence of his record of substantially increased earnings since November 2, 1958 and in view of his positively demonstrated ability to earn wages in excess of his average weekly wage prior to injury, he sustained no loss of wage-earning capacity after November 1, 1958. Appellants say the Commissioner applied an improper standard under Burley Welding Works v. Lawson, 5th Cir. 1944, 141 F.2d 964. There we remarked that an "employee who has sustained a permanent-or temporary-partial disability and who returns to work at the same or higher wages nevertheless may be entitled to compensation if he has sustained a decrease in "wage-earning capacity." Id. at 966.

Examination of Section 908(h) confirms that Burley is inapposite. The statutory scheme shows that the Commissioner is to base his finding of wage-earning capacity on the employee's subsequent wage record unless he determines that these actual earnings do not fairly and reasonably represent wage-earning capacity. All Burley adds to this statutory guideline is that these higher wages are not always determinative. See

California Ship Service Co. v. Pillsbury, 9th Cir. 1949, 175 F.2d 873, 877; Bethlehem Steel Company, Shipbuilding Div. v. Traynor, D. Maryland 1965, 239 F.Supp. 749. The rule-of-thumb for the Commissioner is therefore that "[w]hile the employee's wage-earning capacity is normally determined by his actual earnings, this is by no means necessarily so." Travelers Insurance Co. v. McLellan, 2d Cir. 1961, 288 F.2d 250, 251. This rule also comports with the purpose of section 908(h) which is to allow the Commissioner to consider other factors besides subsequent wages in situations where the employee had no actual earnings after injury or his actual earnings did not reflect his capacity. Furthermore, since these wages are clearly the most concrete data in the compensation calculus, there are strong practical reasons for having the Commissioner begin his analysis with them. After examining the record and noting that the Commissioner spoke in terms of "ability to earn wages," we are persuaded that he focused on the capacity issue and merely used the wages as a guideline. We have found only one decision to the effect that the comparison of earnings before and after injury is not particularly significant. There the court was convinced that the injury would adversely affect the worker's future employment possibilities. See Lawrence v. Norfolk Dredging Co., 4th Cir. 1963, 319 F.2d 805. Surely Tugwell's promotion and his increase in salary from $10,790.41 in 1959 to $14,926.99 in 1964 negate that possibility here. Appellants' only

rebuttal is that if the Commissioner considered post-injury wages reflective of Tugwell's earning capacity, he should have entered a specific finding that these wages were a fair and reasonable indication of this capacity. Because we are convinced that the only reasonable inference which can be drawn from the findings is that the Commissioner considered the actual wages as fairly and reasonably representative of Tugwell's wage-earning capacity, we can find no reversible error in the failure to make findings in the language used by appellants. Cf. Alexander v. Leavey, 5th Cir. 1966, 370 F.2d 536, 537.

Finally, the wording of the finding as to Welch renders these arguments about standards for computing capacity inapplicable. The Commissioner considered all the factors enumerated in section 908(h)(2) and clearly held that Welch suffered no loss of wage-earning capacity from his injury.

AFFIRMED.

APPENDIX D

33 U.S.C. § 908. Compensation for disability

Compensation for disability shall be paid to the employee as follows:

(a) Permanent total disability: In case of total disability adjudged to be permanent 66 2/3 per centum of the average weekly wages shall be paid to the employee during the continuance of such total disability. Loss of both hands, or both arms, or both feet, or both legs, or both eyes, or of any two thereof shall, in the absence of conclusive proof to the contrary, constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

(b) Temporary total disability: In case of disability total in character but temporary in quality 66 2/3 per centum of the average weekly wages shall be paid to the employee during the continuance thereof.

(c) Permanent partial disability: In case of disability partial in character but permanent in quality the compensation shall be 66 2/3 per centum of the average weekly wages, which shall be in addition to compensation for temporary total disability or temporary partial disability paid in accordance with subdivision (b) or subdivision (3) of this section, respectively, and shall

be paid to the employee, as follows:

(1) Arm lost, three hundred and twelve weeks' compensation.

(2) Leg lost, two hundred and eighty-eight weeks' compensation.

(3) Hand lost, two hundred and forty-four weeks' compensation.

(4) Foot lost, two hundred and five weeks' compensation.

(5) Eye lost, one hundred and sixty weeks' compensation.

(6) Thumb lost, seventy-five weeks' compensation.

(7) First finger lost, forty-six weeks' compensation.

(8) Great toe lost, thirty-eight weeks' compensation.

(9) Second finger lost, twenty-five weeks' compensation.

(10) Third finger lost, twenty-five weeks' compensation.

(11) Toe other than great toe lost, sixteen weeks' compensation.

(12) Fourth finger lost, fifteen weeks' compensation.

(13) Loss of hearing: Compensation for loss of hearing of one ear, fifty-

two weeks. Compensation for loss of hearing of both ears, two hundred weeks.

(14) Phalanges: Compensation for loss of more than one phalange of a digit shall be the same as for loss of the entire digit. Compensation for loss of the first phalange shall be one-half of the compensation for loss of the entire digit.

(15) Amputated arm or leg: Compensation for an arm or a leg, if amputated at or above the elbow or the knee, shall be the same as for a loss of the arm or leg; but if amputated between the elbow and the wrist or the knee and the ankle, shall be the same as for loss of a hand or foot.

(16) Binocular vision or per centum of vision: Compensation for loss of binocular vision or for 80 per centum or more of the vision of an eye shall be the same as for loss of the eye.

(17) Two or more digits: Compensation for loss of two or more digits, or one or more phalanges of two or more digits, of a hand or foot may be proportioned to the loss of use of the hand or foot occasioned thereby, but shall not exceed the compensation for loss of a hand or foot.

(18) Total loss of use: Compensation for permanent total loss of use of a member shall be the same as for loss of the member.

(19) Partial loss or partial loss of use: Compensation for permanent partial loss or loss of use of a member may be for proportionate loss or loss of use of the member.

(20) Disfigurement: The deputy commissioner shall award proper and equitable compensation for serious facial or head disfigurement, not to exceed $3,500.

(21) Other cases: In all other cases in this class of disability the compensation shall be 66 2/3 per centum of the difference between his average weekly wages and his wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of such partial disability, but subject to reconsideration of the degree of such impairment by the deputy commissioner on his own motion or upon application of any party in interest.

(22) In any case in which there shall be a loss of, or loss of use of, more than one member or parts of more than one member set forth in paragraphs (1) to (19) of this subdivision, not amounting to permanent total disability, the award of compensation shall be for the loss of, or loss of use of, each such member or part thereof, which awards shall run consecutively, except that where the injury affects only two or more digits of the same hand or foot, paragraph (17) of this subdivision shall apply.

(d) Any compensation to which any claimant would be entitled under subdivision (c) of this section excepting subdivision (c-21) of this section shall, notwithstanding death arising from causes other than the injury, be payable to and for the benefit of the persons following:

(1) If there be a surviving wife or dependent husband and no child of the deceased under the age of eighteen years, to such wife or dependent husband.

(2) If there be a surviving wife or dependent husband and surviving child or children of the deceased under the age of eighteen years, one half shall be payable to the surviving wife or dependent husband and the other half to the surviving child or children.

(3) The deputy commissioner may in his discretion require the appointment of a guardian for the purpose of receiving the compensation of the minor child. In the absence of such a requirement the appointment for such a purpose shall not be necessary.

(4) If there be a surviving child or children of the deceased under the age of eighteen years, but no surviving wife or dependent husband, then to such child or children.

(5) An award for disability may be made after the death of the injured employee.

(e) Temporary partial disability: In case of temporary partial disability resulting in decrease of earning capacity the compensation shall be two-thirds of the difference between the injured employee's average weekly wages before the injury and his wage-earning capacity after the injury in the same or another employment, to be paid during the continuance of such disability, but shall not be paid for a period exceeding five years.

(f) Injury increasing disability: (1) If an employee receive an injury which of itself would only cause permanent partial disability but which, combined with a previous disability, does in fact cause permanent total disability, the employer shall provide compensation only for the disability caused by the subsequent injury: Provided, however, That in addition to compensation for such permanent partial disability, and after the cessation of the payments for the prescribed period of weeks, the employee shall be paid the remainder of the compensation that would be due for permanent total disability. Such additional compensation shall be paid out of the special fund established in section 944 of this title.

(2) In all other cases in which, following a previous disability, an employee received an injury which is not covered by (1) of this subdivision, the employer shall provide compensation only for the disability caused by the subse-

quent injury. In determining compensation for the subsequent injury or for death resulting therefrom, the average weekly wages shall be such sum as will reasonably represent the earning capacity of the employee at the time of the subsequent injury.

(g) Maintenance for employees undergoing vocational rehabilitation: An employee who as a result of injury is or may be expected to be totally or partially incapacitated for a remunerative occupation and who, under the direction of the Secretary as provided by section 939(c) of this title, is being rendered fit to engage in a remunerative occupation, shall receive additional compensation necessary for his maintenance, but such additional compensation shall not exceed $25 a week. The expense shall be paid out of the special fund established in section 944 of this title.

(h) The wage-earning capacity of an injured employee in cases of partial disability under subdivision (c) (21) of this section or under subdivision (e) of this section shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity: Provided, however, That if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the deputy commissioner may, in the interest of justice, fix such wage-earning capacity

as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

(i) In cases under subdivision (c) (21) and subdivision (e) of this section, whenever the deputy commissioner determines that it is for the best interests of an injured employee entitled to compensation, he may, with the approval of the Secretary, approve agreed settlements of the interested parties, discharging the liability of the employer for such compensation, notwithstanding the provisions of sections 915(b) and 916 of this title: Provided, That the sum so agreed upon shall be payable in installments as provided in section 914(b) of this title, which installments shall be subject to commutation under section 914(j) of this title: And provided further, That if the employee should die from causes other than the injury after the Secretary has approved an agreed settlement as provided for in this chapter, the sum so approved shall be payable, in the manner prescribed in this subdivision, to and for the benefit of the persons enumerated in subdivision (d) of this section. Mar. 4, 1927, c. 509, § 8, 44 Stat. 1427; May 24, 1934, c. 354, §§ 2, 3, 48 Stat. 806; June 25, 1938, c. 685, §§ 4, 5, 52 Stat. 1165; 1946 Reorg. Plan No. 2, § 3, eff. July

16, 1946, 11 F.R. 7873, 60 Stat. 1095; June 24, 1948, c. 623 § 2, 62 Stat. 602; 1950 Reorg. Plan No. 19, § 1, eff. May 24, 1950, 15 F.R. 3178, 64 Stat. 1271; July 26, 1956, c. 735, §§ 2, 3, 70 Stat. 655.

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 24082

FREDDIE JOE WELCH and PAUL L. TUGWELL,

Appellants

v.

GERALD B. LEAVEY, DEPUTY COMMISSIONER, ET AL

Appellees

Appeals from the United States District Court for the Southern District of Texas

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ON PETITION FOR REHEARING

(August 21, 1968)

Before JONES, WISDOM and THORNBERRY, Circuit Judges.

PER CURIAM:

It is ORDERED that the petition for rehearing filed in the above styled and numbered cause be, and the same is, hereby DENIED.

APPENDIX F

33 U.S.C. § 902. Definitions

(10) "Disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.

(13) "Wages" means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the injury, including the reasonable value of board, rent, housing, lodging, or similar advantage received from the employer, and gratuities received in the course of employment from others than the employer.

APPENDIX G

Calendar No. 2100

75th CONGRESS 3d Session — SENATE — REPORT No. 1988

AMENDING THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT

June 6, 1938.--Ordered to be printed

Mr. BURKE, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany H. R. 5690]

The Committee on the Judiciary, to whom was referred the bill (H. R. 5690) to amend the Longshoremen's and Harbor Workers' Compensation Act, after consideration and amendment of the same, report the bill to the Senate with the recommendation that, as amended, it do pass.

The Senate amendment clarifies provisions for employer's subrogation on claims.

The House report being clear explanatory of the bill is here incorporated and made a part hereof.

House Report No. 1945, Seventy-fifth Congress,

Third Session

The Committee on the Judiciary, to whom was referred the bill (H. R. 5690) to amend the Longshoremen's and Harbor Workers' Compensation Act, after consideration, report the same favorably to the House with amendments with the recommendation that as so amended the bill do pass.

The committee amendments are as follows:

Page 1, line 9, after the word "parentis" insert "for".

Page 5, line 8, after the word "impairment" insert a comma and the words "his usual employment" and another comma.

Page 11, line 7, after the word "to" insert "such fine or".

GENERAL STATEMENT

This bill amends certain sections of the Longshoremen's and Harbor Workers'

Compensation Act in the manner hereinafter explained. All sections of that act which are not amended by this bill remain in full force and effect as they now exist, including all limitations upon the amount of compensation payable under the existing terms of the act.

The bill was introduced at the request of the United States Employees' Compensation Commission, which body has responsibility for the administration of the act. It embodies amendments which the Commission, as a result of its experience, has found desirable. A communication from the Chairman of the Commission to the Speaker of the House, requesting the introduction and consideration of the proposed legislation by Congress, follows:

UNITED STATES EMPLOYEES'
COMPENSATION COMMISSION
Washington, February 24, 1937.

Hon. WILLIAM B. BANKHEAD,
Speaker, House of Representatives,
Washington, D. C.

DEAR MR. SPEAKER: The United States Employees' Compensation Commission, in its annual reports since the Longshoremen's and Harbor Workers' Compensation Act became effective on July 1, 1927, has from time to time recommended certain amendments therein which its experience

in the administration of the act has suggested as advisable. By the act of May 26, 1934, Public, No. 257, passed at the recommendation of representatives of interested employers and employees, some of the situations to which the Commission had called attention as needing amendment were dealt with. Subsequent experience has indicated that on some points covered by the act of May 26, 1934, further amendment is desirable. These, together with recommendations on other points which the Commission heretofore made, and a few others, have been embodied in a draft of a bill in order to place the matter before the Congress in form for its consideration and action. The said draft is herewith enclosed, with the request that it be introduced in the House of Representatives and so put in line for consideration, with a view to its enactment. Where the amendment of any provision consists of the introduction of new words therein, the words so added are indicated by underscoring in the draft; and where the amendment consists of the ommission of words now in the law, the words so omitted are shown in canceled type.

In connection with the draft of the bill, there is also enclose herewith a memorandum commenting upon the bill, section by section, and giving a brief explanation of the several amendments embodied in it and the reasons therefor.

A copy of the draft above referred to, together with a copy of the accompanying memorandum, is being transmitted at the same time, and with a like request, to the chairman of the Senate Committee on the Judiciary.

In May 1935 a similar draft was submitted by the Commission to the chairmen of the Committees on the Judiciary of the Senate and House of Representatives, respectively, and was as requested by the Commission introduced in the Seventy-fourth Congress, being S. 2791 and H. R. 8293, respectively. Hearings were had by each committee and the bill was favorably reported in both houses, but was not enacted during the Seventy-fourth Congress. The draft herewith submitted is substantially identical with the bills above referred to, with the exception that in section 5 the proposed new subdivision (h) of section 8 has been redrafted, and sections 9, 11, and 13 contain new amendments which have been added. Section 9 proposes to amend subdivisions (g) of section 19; section 11 proposes a new subdivision (f) of section 30; and section 13 proposes to amend section 38, adding additional penal provisions. The reasons for these additional amendments are set forth in the accompanying memorandum.

As the provisions of the Longshoremen's Act affect private interests, namely, the rights and obligations of

employers and employees in maritime employment in respect to compensation for disability resulting through injury occurring on the navigable waters of the United States, as well as of certain employers and employees in the District of Columbia, to whom the provisions of the Longshoremen's Act were made applicable by the act of May 17, 1928, it is suggested that hearings upon the measure be had in due course, at which interested parties may have opportunity to express their views for or against the proposed amendments. In that connection, the Commission will be glad to furnish, as far as it may be able, any additional information which may be desired by the committee.

This letter, with the accompanying papers, has been submitted to the Director of the Bureau of the Budget and he advised the Commission that the recommendation herein is in accord with the policy program of the President.

Very truly yours,

(Mrs.) JEWELL W. SWOFFORD,

Chairman.

* * * *

SECTION 5

The proposed amendment adding subdivision (h) to section 8 is to clarify the interpretation to be placed upon the words "wage-earning capacity" used in the act in connection with partial-disability cases. The absence of clarity in the Longshoremen's Act in this respect has been productive of wasteful litigation which has not resulted in settling the complex question of the proper factors to be considered in connection with the determination of an employee's wage-earning capacity after injury. A provision to accomplish the same general purpose was added to the New York workmen's compensation law in 1930, which will be found as subdivision 5-a of section 15 of the New York act. The proposed amendment is constructed partly after the New York provision, with an addition thereto incorporating, for clearness and for assistance to the deputy commissioners and others, a general reference to the factors to be considered in determining an employee's wage-earning capacity.

It also provides for consideration of the effects of an injury, causing permanent partial disability, upon the employee's future ability to earn. The proposed changes have been made with the view to having wage-earning capacity determined upon considerations which

the courts have found to be just and proper. Often an employee returns to work earning for the time being the same wages as he earned prior to injury, although still in a disabled condition and with his opportunity to secure gainful employment definitely limited. For instance, an employee may have an industrial hernia, retainable by a truss but not operable; but his old employer might be willing to continue him on in employment at the rate of pay at time of injury notwithstanding his impaired condition, particularly where the job does not require able-bodied labor. It is clear that in such a case the employee's ability to compete in the labor market has been definitely affected; and, though at present the employee is paid his former full-time earnings, he suffers permanent partial disability which should be compensable under the Longshoremen's Act, considering not only the present effect of the disability on the employee's wage-earning capacity but also the future consequences of such disability on the employee's capacity to earn as it naturally extends into the future. The Longshoremen's Act should provide that the Deputy Commissioner may consider all of the factors which the more recent trend of decisions indicates are the logical and proper factors in the determination of wage-earning capacity.

In a case such as that referred to above where the employee returns to employment without apparent wage loss, notwithstanding impairment of physical condition and probable impairment of

future wage-earning capacity, an unscrupulous employer might with profit to himself continue the original wages, particularly if low, until the limitations in the act with respect to the filing of claim for compensation and right of review of the case (sec. 22) had run, after which time the employee's right to compensation would be barred and the employee if then cast adrift would become and remain an object of charity. It can be seen that an unscrupulous employer might thus defeat the beneficent provisions of the Longshoremen's Act. Court decisions recognizing factors other than actual wages paid after injury are Dragons case (161) N. E. 816, Mass.); Roller v. Warren (129 Atl. 158, Vt.); Postal Telegraph Cable Company v. Industrial Accident Commission of California (3 Pac. (2d) 6); Hartford Accident & Indemnity Company v. Hoage (85 Fed. (2d) 420).

The suggested addition of subdivision (i) to section 8 is designated to afford the interested parties the opportunity of amicably disposing of cases upon agreed settlements approved by the deputy commissioner, after approval by the Commission, where awards have been made under section 8 (c) (21) and section 8 (e). Experience shows that in many cases involving disabilities under these provisions (by which compensation is based on loss of earning capacity and is subject to readjustment from time to time over long periods) agreed settlements as approved by the deputy commissioner, with approval of the Commission,

would be desirable and in the interest of all parties concerned. Such settlements would be advantageous in cases involving considerable elements of doubt and, particularly where neurosis is involved, notably in cases involving back strains, traumatic neurosis, and similar disabilities in which the symptoms are for the most part subjective.

Experience, however, warns against lump-sum payments merely as a convenience in disposing of such cases. Large payments of compensation are in most cases soon dissipated, or improvidently or foolishly invested, leaving the employee an early dependent upon charity. In the proposed section the benefit of finality in the adjustment of the claim is obtained, with both employer and employee knowing of and agreeing upon the total compensation to be paid, and at the same time the provision for payments in periodic installments will afford maximum benefit and protection to the employee. Being also subject to commutation under section 14 (j), as in case of other fixed awards, the provision is flexible enough to enable the deputy commissioner, with the Commission's approval, to provide for payment in sums sufficient to satisfy the needs of any particular situation that may arise.

See also the House of Representatives, 75th Congress--3rd Session, Report No. 1945, which is the same report.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 757

FREDDIE JOE WELCH AND PAUL L. TUGWELL,
PETITIONERS

v.

GERALD B. LEAVEY, DEPUTY COMMISSIONER, UNITED STATES DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT DEPUTY COMMISSIONER IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals is reported at 397 F. 2d 189. The district court rendered no opinion.

JURISDICTION

The judgment of the court of appeals was entered on July 10, 1968, and a petition for rehearing was denied on August 21, 1968. The petition for a writ of certiorari was filed on November 19, 1968. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

328-867—68

QUESTION PRESENTED

Whether the Deputy Commissioner's orders, denying the petitioners compensation for permanent partial disability, were supported by substantial evidence.

STATEMENT

Petitioners Paul L. Tugwell and Freddie Joe Welch are longshoremen who sustained back injuries while at work (Pet. App. 2a, 9a). Both men claimed compensation under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*

Tugwell: After a hearing, the Deputy Commissioner found that Tugwell was wholly disabled from July 13, 1958, to October 18, 1958, for which he was entitled to $756.00 compensation; that his earning capacity was reduced between October 19, 1958, and November 1, 1958, for which he was entitled to $88.20 compensation; and that he suffered a 20 percent loss of use of the body as a whole, with maximum improvement occurring on or about May 5, 1961 (Pet. App. 2a, 3a). The Deputy Commissioner denied Tugwell compensation for permanent partial disability, finding:

> 10. As a consequence of his record of substantially increased earnings since November 2, 1958, and in view of his positively demonstrated ability to earn wages in excess of his average weekly wage prior to injury, it is accordingly herewith determined that the claimant has sustained no loss of wage earning capacity as a consequence of his injury of July 12, 1958, within the meaning and intention of the Longshoremen's and Harbor Workers' Act. [Pet. App. 4a.]

Welch: After a hearing the Deputy Commissioner found that Welch's weekly earning capacity was reduced between November 24, 1961, the date of the injury, and May 30, 1963, for which he was entitled to $1,198.43 compensation; and that he suffered a 5 to 10 percent loss of use of the body as a whole, with maximum improvement obtained on May 30, 1965 (Pet. App. 9a, 10a). The Deputy Commissioner denied Welch compensation for permanent partial disability, finding:

> 7. In consideration, therefore, of the claimant's demonstrated ability to earn wages during a substantial period of his disability, which were equal to or in excess of his average weekly wage prior to his injury, and considering the degree or percentage of his physical impairment, his usual employment, and other factors and circumstances which might affect his capacity to earn wages in his disabled condition, including the effect of such disability as it may naturally be expected to extend into the future, it is determined that the claimant suffered no loss of wage earning capacity subsequent to May 30, 1963, as a consequence of his injury of November 24, 1961. [Pet. App. 10a–11a.]

Both petitioners sought review (R. 1, 78); the two actions were consolidated (R. 22, 92); the district court granted the Deputy Commissioner's motions for summary judgment (R. 71, 72, 76, 126); and, on petitioners' appeal, the Court of Appeals for the Fifth Circuit affirmed (Pet. App. 25a), finding "substantial evidence to support" the orders denying compensation benefits (Pet. App. 20a).

ARGUMENT

1. It is settled that the role of the courts on review of the evidence in compensation cases under the Longshoremen's and Harbor Workers' Compensation Act is limited to determining whether the Deputy Commissioner's orders are supported by substantial evidence on the record as a whole. *O'Keeffe* v. *Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359; *Voehl* v. *Indemnity Insurance Co.*, 288 U.S. 162; *Del Vecchio* v. *Bowers*, 296 U.S. 280; *Cardillo* v. *Liberty Mutual Insurance Co.*, 330 U.S. 469; *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 504; see, also, *Owens* v. *Traynor*, 396 F. 2d 783 (C.A. 4), certiorari denied, November 25, 1968, No. 529, this Term. In the present case, both the district court and the court of appeals so found with respect to each petitioner (R. 71–72; Pet. App. 20a). This determination does not warrant further review.

Petitioners do not argue that the facts show an actual loss of earning capacity but rather that because their functioning was permanently impaired, such a loss must be presumed. Section 8(c)(21) of the Act, 33 U.S.C. 908(c)(21), governs the right to compensation for permanent partial disability such as petitioners suffered.

> * * * the compensation shall be 66⅔ per centum of the difference between his average weekly wages and his wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of such partial disability * * *.

Petitioners' claim is that the Deputy Commissioner denied them compensation solely because their post-

injury earnings, as distinguished from earning capacities, were higher than their pre-injury earnings. But while the Deputy Commissioner found that Tugwell and Welch both suffered permanent physical infirmities (Pet. App. 3a, 10a), he also specifically found that neither man's physical condition imposed a "loss of wage earning capacity" (Pet. App. 4a, 11a, 24a). In each case, the post-injury wage earning capacity exceeded the pre-injury wages, resulting in no economic disability. Obviously, if wage-earning capacity after the injury is greater than or equal to average weekly wages prior to the injury, there can be no compensation for the permanent infirmity under the statutory formula. Petitioners' claim is thus unfounded here. Their physical infirmities, unaccompanied by any reduction in earning capacity, are not compensable under the Act.[1] See Section 2(10) of the Act (Pet. App. 37a); *McGrath* v. *Hughes,* 289 F. 2d 403 (C.A. 2).

2. Petitioners also argue that the Deputy Commissioner's order, at least in Tugwell's case, was defective because it lacked an explicit finding that the claimant's actual earnings fairly and reasonably represented his wage-earning capacity. Section 8(h) of the Act, 33 U.S.C. 908(h), added by amendment in 1938, provides:

[1] Petitioners complain that the denial of compensation to them is inequitable because of the assurance of compensation to claimants who receive certain specific injuries, such as loss of an arm or an eye (Pet. 10, 11). However, this distinction is required by the Act. Compare Section 8(c)(1–17) of the Act, 33 U.S.C. 908(c)(1–17), with Section 8(c)(21), 33 U.S.C. 908(c)(21).

> [t]he wage-earning capacity under subdivision (c)(21) of this section * * * shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity: *Provided, however,* That if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the deputy commissioner may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

As the court of appeals stated, with respect to Tugwell, "the only reasonable inference which can be drawn from the findings is that the Commissioner considered the actual wages as fairly and reasonably representative of Tugwell's wage-earning capacity * * *" (Pet. App. 25a). In the Welch order, as the court of appeals recognized, the Deputy Commissioner considered all the factors which must be taken into account in fixing a claimant's wage-earning capacity in the absence of earnings which "fairly and reasonably represent his wage-earning capacity" and only then determined that his actual wages were equivalent to his earning capacity (Pet. App. 25a). No more explicit finding is required.

3. The decision below does not conflict with the decision of the Court of Appeals for the Fourth Cir-

cuit in *Ennis* v. *O'Hearne,* 223 F. 2d 755, or with the decision of the Court of Appeals for the Second Circuit in *Travelers Insurance Co.* v. *McLellan,* 288 F. 2d 250. In the *Ennis* case the court found only that there was no evidence to support the Deputy Commissioner's finding that the claimant was disabled in the medical sense. In *Travelers,* the Deputy Commissioner had exercised his power to fix a claimant's post-injury earning capacity at a rate different from his actual post-injury wages, but the district court had set his award aside; the reviewing court properly recognized that "[w]hile the employee's wage-earning capacity is normally determined by his actual earnings, this is by no means necessarily so," and reinstated the award. Its view is entirely consistent with the opinion below in this case, as is shown by the approving citation given *Travelers* here (Pet. App. 24a).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
EDWIN L. WEISL, JR.,
Assistant Attorney General.
MORTON HOLLANDER,
JUDITH S. SEPLOWITZ
Attorneys.

DECEMBER 1968.

U.S. GOVERNMENT PRINTING OFFICE: 1969

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NO. 757

IN THE

Supreme Court of the United States

October Term, 1968

FREDDIE JOE WELCH

AND

PAUL L. TUGWELL, *Petitioners*

v.

GERALD B. LEAVEY,
DEPUTY COMMISSIONER, ET AL,
Respondents

On Petition for Writ of Certiorari to the Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI OF RESPONDENTS, ATLANTIC & GULF STEVEDORES, INC., YOUNG & COMPANY OF HOUSTON AND TEXAS EMPLOYERS' INSURANCE ASSOCIATION

TO THE HONORABLE JUDGES OF SAID COURT:

The Petitioners[1] in this case seek a review of fact findings made by the Deputy Commissioner in his Compensation Orders under the Longshoremen's Act in which he found:

1. Hereafter also referred to on occasions as 'Tugwell" and "Welch".

> That neither Tugwell nor Welch had a loss of wage-earning capacity as a result of their injuries sustained while working as longshoremen, although both have a permanent partial disability to their body generally from a medical standpoint.

As the Longshoremen's Act expressly provides that compensation shall be paid only for a loss of wage-earning capacity and not on the basis of some medical disability to the body generally, both the District Court and the Court of Appeals below affirmed these fact findings by the Deputy Commissioner in both Tugwell and Welch.

OPINIONS BELOW

For the convenience of the Court, the opinion of the Court of Appeals below which is reported at 397 F.2d 189 is printed as Appendix A to this brief.[2]

Although Petitioners are correct in saying there was no written opinion from the District Court below, that Court did make docket entries, and although they are not particularly helpful, for the sake of completeness, so far as applicable to the matters raised in the Petition for a Writ of Certiorari, these docket entries are printed as Appendix to this brief.[3]

STATUTES INVOLVED

The pertinent portions of the Longshoremen's & Harbor Workers' Compensation Act which are involved are found in Section 902(10),[4] Section 908(c)[5] which covers com-

2. Appendix A, *infra*, pages 1A to 7A.

3. Appendix B, *infra*, page 8A.

4. 33 U.S.C.A. §902(10).

5. 33 U.S.C.A. §908(c).

pensation for "permanent partial disability" in 22 separate subdivisions, and Section 908(h)[6] which specifically defines the term "wage-earning capacity" as used in subdivision (21) of Section 908(c).[7] Where pertinent here, these provisions read as follows:

1. Section 902 (33 U.S.C.A. 902)

> "(10) *Disability" means incapacity* because of injury *to earn the wages* which the employee was receiving at the time of the injury *in the same or any other employment."* (Emphasis supplied)

2. Section 908(c) (33 U.S.C.A. 908(c))

. . . . . .

> "(21) Other Cases: In all other cases (injuries to body generally) in this class of disability (permanent partial) the *compensation shall be* 66-2/3 percentum of *the difference between his average weekly wages (prior to the injury) and his wage-earning capacity thereafter in the same employment or otherwise,* payable during the continuance of such partial disability, but subject to reconsideration of the degree of such impairment by the Deputy Commissioner on his own motion or upon application of any party in interest." (Parenthetical expressions and emphasis supplied)

3. Section 908(h) (33 U.S.C.A. 908(h))

. . . . . .

> "(h) The wage-earning capacity of an injured employee under subdivision (c) (21) of this section (Section 908) . . . . (1) shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity:

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6. 33 U.S.C.A. §908(h).

7. 33 U.S.C.A. §908(c)(21).

(2) *Provided, however,* that if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the deputy commissioner may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of the injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition including the effect of disability as it may naturally extend into the future." (Italics in statute, parenthetical reference to Section 908 and numerals (1) and (2) added.)

REASONS FOR DENYING THE WRIT

1.

The decision of the Court of Appeals below was compelled by three separate and distinct provisions in the Longshoremen's Act which require a loss of wage-earning capacity before compensation can be awarded for a medical disability.[8]

2.

Contrary to the contentions made in the Petition, the decision of the Court of Appeals below is not in conflict with the decisions referred to from the Courts of Appeal for the Second[9] and Fourth Circuits,[10] but in fact is entirely consistent with them and all other decisions that have considered similar questions.[11]

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8. See full discussion, *infra*, pages 8 to 10.

9. *Travelers Insurance Company v. McLellan*, 2 Cir. 1961, 288 F.2d 250.

10. *Ennis v. O'Hearne*, 4 Cir. 1955, 223 F.2d 755.

11. See full discussion, *infra*, pages 10 to 13.

3.

The findings made by the Deputy Commissioner were ultimate fact findings and clearly met the standards of completeness without minutia required of administrative fact findings, and the holding of the Court below to this effect is not in conflict with this Court's opinion in the case relied on by Petitioners.[12]

ADDITIONAL STATEMENT OF THE CASE

1. As to Tugwell

While there was a conflict in the medical evidence presented before the Deputy Commissioner, his order found that Tugwell had a "permanent partial disability equivalent to 20% loss of use of the body as a whole, including such part thereof as may have been caused by aggravation to his pre-existing congenital anomaly.[13] The Deputy Commissioner found that following his injury of July 12, 1958 Tugwell returned to full time employment as a longshoreman on November 2, 1958 and for approximately the next six years Tugwell's actual earnings exceeded his actual earnings prior to the injury by approximately $99.00 per week. By the year 1964 his actual earnings as a longshoreman had almost doubled those he was earning prior to his injury.[14] Based on this evidence

12. See full discussion, *Infra*, pages 13 to 15.

13. Appendix A, Petition for Writ of Certiorari, page 3a.

14. Somewhat more in detail the specific facts found by the Deputy Commissioner so far as pertinent to the petition were as follows:

1. Tugwell's average weekly wage at the time of the injury was $146.36, which would be $7,610.72 per year. (Finding No. 3).
2. Tugwell has a permanent partial disability equivalent to 20 per cent loss of use of the body as a whole, including such

relating to his actual wage-earning capacity and the other evidence in the record such as the affirmative testimony of Dr. George Lane that Tugwell "had no disability in terms of loss of earning capacity,"[15] the Deputy Commissioner specifically found as follows:

> "As a consequence of his record of substantially increased earnings since November 2, 1958, and in view of his positively demonstrated ability to earn wages in excess of his average weekly wage prior to injury, it is accordingly herewith determined that the claimant has sustained no loss of wage earning capacity as a consequence of his injury of July 12, 1958, within the meaning and intention of the Longshoremen's & Harbor Workers' Act."[16]

---

part thereof as may have been caused by aggravation to his pre-existing congenital anomaly (Finding No. 6).

3. Maximum improvement occurred on or about May 5, 1961 (Finding No. 7).
4. Tugwell has had the following earnings since his injury: From November 2, 1958, to December 31, 1958, he earned $1,664.98, averaging $185.00 per week, or an excess of $38.64 per week above his average weekly wage prior to injury. His earnings after December 31, 1958 were as follows:
   For the year 1959, $10,790.41;
   For the year 1960, $13,778.26;
   For the year 1961, $12,262.74;
   For the year 1962, $12,452.75;
   For the year 1963, $12,344.67;
   For the year 1964, $14,926.99.
   Tugwell's average weekly wage for the consecutive six year period above shown was $245.37, or an excess per week of $99.01 above his average weekly wage of $146.36 prior to injury (Finding No. 8).
5. From January 1, 1965 to March 8, 1965 (less the seven week strike period) Tugwell's average weekly wage was $230.04, or an excess of $83.68 per week above his average weekly wage prior to injury (Finding No. 9).

Appendix A, Petition for Writ of Certiorari, pages 2a to 4a.

15. Transcript in Court below, page 152.

16. Appendix A, Petition for Writ of Certiorari, page 4a.

2. As to Welch

The Deputy Commissioner found that as a result of his injury of November 24, 1961, Welch sustained a "permanent partial disability determined to be not less than five percent nor in excess of ten percent for loss of use of the body as a whole.[17] The Deputy Commissioner further found that Welch's disability became permanent on May 30, 1963, that he continued to work as a longshoreman with no loss of wages from that date to the date of the hearing and that his average weekly wages after that date were in excess of the pre-injury earnings.[18] Based upon all of the evidence in the record, the Deputy Commissioner found that Welch had sustained no loss of wage-earning capacity after May 30, 1963 in the following language:

> "In consideration, therefore, of the claimant's demonstrated ability to earn wages during a substantial period of his disability, which were equal to or in excess of his average weekly wage prior to his injuries, and considering the degree or percentage of his physical impairment, his usual employment and other factors and circumstances which might affect his capacity to earn wages in his disabled condition, including the effect of such disability as it may naturally be expected to extend into the future, it is determined that the claimant suffered no loss of wage earning capacity subsequent to May 30, 1963, as a consequence of his injury of November 24, 1961."[19]

With this brief explanation of the facts, which fully supported the Deputy Commissioner's ultimate fact finding that neither Tugwell nor Welch sustained a loss of wage-

17. Appendix B, Petition for Writ of Certiorari, page 10a.

18. Ibid.

19. Ibid.

earning capacity as required by the Longshoremen's Act, it becomes obvious why both the District Court and the Court of Appeals below affirmed the Deputy Commissioner's Compensation Order.

ARGUMENT

1.

LONGSHOREMEN'S ACT REQUIRES LOSS OF WAGE-EARNING CAPACITY

Petitioner's primary contention in this Court, as it was in the Court of Appeals below, is that the Deputy Commissioner's findings that Tugwell and Welch had a permanent partial disability to the body generally, compelled a finding that they were entitled to additional compensation benefits, even though neither of them had any loss of earnings or loss of wage-earning capacity as expressly required by the Longshoremen's Act.

This contention completely ignores three separate and distinct provisions in the Longshoremen's Act which, as the Court of Appeals for the Second Circuit has said, clearly impose "upon the Deputy Commissioner and the reviewing courts the duty to evaluate the extent of a claimant's disability in economic rather than medical terms".[20] These three separate and distinct provisions are:

1. Section 902(10) which defines the term "disability" in these terms:

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20. *John W. McGrath Corporation v. Hughes*, 2 Cir. 1961, 289 F.2d 403, at page 405.
Accord: *Owens v. Traynor*, D.C. Md. 1966, 274 F.Supp. 770, at page 774, affirmed 4 Cir. 1968, 396 F.2d 783, cert. denied, November 25, 1968, No. 529, 37 U.S. Law Week 3192. *Miller v. O'Hearne*, D.C. Md. 1960, 181 F.Supp. 105.

"(10) 'Disability' means *incapacity* because of injury *to earn the wages* which the employee was receiving at the time of the injury *in the same or any other employment.*" (Emphasis supplied) [33 U.S.C.A. 902(10)]

2. Section 908(c) which expressly provides that in permanent partial disability cases to the body generally

"the compensation *shall* be . . . .

"the difference between his average weekly wages (prior to his injury) and *his wage-earning capacity thereafter* in the same employment or otherwise." (Emphasis and parenthetical expression added) [33 U.S.C.A. 908(c) (21)]

Thus by statutory definition compensation is payable for permanent partial disability to the body generally only if this disability produces an "incapacity to earn" wages or a loss of wage-earning capacity. The Longshoremen's Act does not stop here, however, but goes even further and defines what factors are to be considered in determining the "wage-earning capacity" of an employee in cases involving permanent partial disability to the body generally:

3. Section 908(h) defines "wage-earning capacity" as used in Section 908(c) (21) in the alternative:

(a) First, "wage-earning capacity *shall* be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity," (Emphasis supplied)

or

(b) Second, "if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the Deputy Commisioner may, in the interest of justice, fix such wage earning capacity as shall

> be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition including the effect of disability as it may naturally extend into the future." [33 U.S.C.A. 908(h)]

The Deputy Commissioner used the first definition above in Tugwell and the second definition above in Welch.

Thus, the Longshoremen's Act makes it perfectly clear in three separate places that a medical disability to the body generally, such as is involved in both Tugwell and Welch, are to be compensated only if this medical disability creates an "incapacity to earn wages" they were earning at the time of the injury "in the same or any other employment."

2.

OPINION BELOW NOT IN CONFLICT WITH OTHER COURTS OF APPEAL

Neither of the cases relied on by Petitioners in their attempt to demonstrate a conflict with the decisions of other Courts of Appeal are in conflict with the holding of the Court below which followed this clear and unambiguous Congressional mandate:

1. Petitioners assert a conflict exists with the *Ennis* case[21] from the Court of Appeals for the Fourth Circuit but *Ennis* does not hold that a medical disability without more requires the payment of compensation as Petitioners contend and in fact does

21. *Ennis v. O'Hearne*, 4 Cir. 1955, 223 F.2d 755.

not either involve or discuss this issue. All that the Court of Appeals for the Fourth Circuit held in *Ennis* was that the matter had to be remanded to the Deputy Commissioner for a new hearing with leave to the parties to introduce new evidence because the Deputy Commissioner's Compensation Order denying compensation was not supported by any evidence in the record. It does not discuss in any way the question of whether under the three provisions of the Longshoremen's Act discussed above a person is entitled to compensation when he has no loss of wage-earning capacity as a result of the injury.

In fact, a recent decision of the Court of Appeals for the Fourth Circuit demonstrates quite clearly that that Court would reach precisely the same result in Tugwell and Welch as that reached by the Court of Appeals below.[22] In *Owens* the Court of Appeals for the Fourth Circuit had a case that involved an injury which required an operation on the employee's back and resulted in a 25% permanent partial medical disability.[23] The Deputy Commissioner denied compensation for this medical disability because the employee had not sustained any loss of wage-earning capacity as a result of it, which is a pre-requisite to an award of compensation under the Longshoremen's Act. This finding was affirmed by both the District Court and the Court of Appeals for the Fourth Circuit. Thus, the decision of the Court of Appeals for the Fourth Circuit in the *Owens* case which has specifically considered the same question involved in this petition, is in complete accord with the Court of Ap-

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22. *Owens v. Traynor*, 4 Cir. 1968, 396 F.2d 783, cert. denied, November 25, 1968, No. 529, 37 U.S. Law Week 3192.

23. The opinion of the Court of Appeals for the Fourth Circuit does not reflect this information, but it is shown in the opinion of the District Court, *Owens v. Traynor*, D.C. Md. 1966, 274 F.Supp. 770, at page 772.

peals below. The decision of the Court of Appeals for the Fourth Circuit in *Ennis* cannot be in conflict with either its own decision in *Owens* or the decision of the Courts of Appeals below in these cases since the question presented by the petition herein was not even involved or considered by it in *Ennis*.

2. Petitioners also assert that a conflict exists with the *McLellan* case[24] from the Court of Appeals for the Second Circuit. *McLellan* not only is not in conflict with the Court of Appeals below, but in fact makes it abundantly clear that it is a loss of wage-earning capacity only, which is compensable under the Longshoremen's Act, and that the Deputy Commissioner was correct in awarding compensation not for any "medical disability" but for the claimant's loss of wage-earning capacity, which is the statutory criteria. Thus, *McLellan* is entirely consistent with the decision of the Court of Appeals below in these cases, and clearly reflects that precisely the same result would have been reached by it had these cases been pending before it rather than in the Court of Appeals for the Fifth Circuit.

But if any possible doubt can exist from *McLellan* that the court of Appeals for the Second Circuit would reach the same result in the case as that of the Court of Appeals below, it is dispelled completely by the decision of the Court of Appeals for the Second Circuit in the *Hughes* case. In *Hughes* the Court of Appeals states affirmatively that the disability of a claimant under the plain provisions of the Longshoremen's Act must be evaluated "in economic rather than medical terms."[25]

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24. *Travelers Insurance Company v. McLellan*, 2 Cir. 1961, 288 F.2d 250.

25. *John W. McGrath Corporation v. Hughes*, 2 Cir. 1961, 289 F.2d 403, at page 405.

Thus, it is clear that both the Court of Appeals for the Second and Fourth Circuits are in full agreement with the holding of the Court of Appeals below that

> "It is well settled that this statutory framework commands the Commissioner to translate disability in a medical sense into economic disability within the meaning of the Act."[26]

If the medical disability does not produce any "economic disability", that is, a loss of wage-earning capacity, it is not compensable under the Longshoremen's Act, and the Court of Appeals below was correct in so holding.

3.

DEPUTY COMMISSIONER'S FINDINGS OF FACT ARE NOT INCOMPLETE

Petitioners contend that the findings of fact made by the Deputy Commissioner are not sufficiently specific because he did not make a finding as to whether their earnings subsequent to the injury fairly and reasonably represented their wage-earning capacity. Petitioners rely on this Court's decision in the *Automatic Canteen Company* case[27] and state that it is believed by them to be in conflict with the decision of the Court below in this case.

That the findings of the Deputy Commissioner in these cases are not the generalities condemned by this Court in *Automatic Canteen* can quickly be seen from this brief

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26. Appendix A, *infra*, page 4A.

27. *Automatic Canteen Co. v. Federal Trade Commission*, 1953, 346 U.S. 61, 97 L.Ed. 1454, 73 S.Ct. 1017.

quotation from Mr. Justice Frankfurter's opinion in that case:

> ". . . While this Court ought scrupulously to abstain from requiring of the Commission particularization in its findings so exacting as to make this Court in effect a Court of review on the facts, it is no less important, since we are charged with the duty of reviewing the correctness of the standards which the Commission applies, and the essential fairness of the mode by which it reaches its conclusions, that the Commission do not shelter behind uncritical generalities or such looseness of expression as to make it essentially impossible for us to determine what really lay behind the conclusions which we are to review. . . ."[28]

Certainly, no one would seriously contend that the Deputy Commissioner's findings in these two cases are "uncritical generalities" which "make it essentially impossible for" a Court "to determine what really lay behind the conclusions" which the Court below was reviewing.

As both the District Court and the Court of Appeals below hold, in Tugwell the only reasonable inference that can be drawn from the Deputy Commissioner's findings are that he considered that Tugwell's actual wages fairly and reasonably represented his wage-earning capacity since he found that these actual earnings demonstrated that he in fact had no loss of wage-earning capacity.

In Welch, it is also clear from the Deputy Commissioner's Compensation Order that the Deputy Commissioner did not consider that Welch's actual earnings sub-

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28. 346 U.S. 61, at page 81, 97 L.Ed. 1454, at page 1467.

sequent to the injury necessarily represented his wage-earning capacity. This is manifest from the fact that the Deputy Commissioner specifically resorted to and considered all of the factors contained in the second definition of wage-earning capacity contained in Section 908(h) of the Longshoremen's Act.[29] It is perfectly clear and obvious from the Compensation Order in Welch that the Deputy Commissioner used the second definition in that section of the Act in arriving at his determination that Welch had no loss of wage-earning capacity.

In effect, all the Petitioners' contention amounts to in this regard is that the Deputy Commissioner did not make fact findings in the precise language which Petitioners would have liked for him to use.

Surely the findings made by the Deputy Commissioner in these two cases adequately and clearly reflect precisely what basic facts he found, and even indicate as well that section of the statute on which he based his finding of no loss of wage-earning capacity in each of the cases.

To require any more of administrative hearing officers in their findings of fact would be to require them to make detailed evidentiary findings rather than the basic fact findings which are all that are reasonably necessary or that this Court has ever required.

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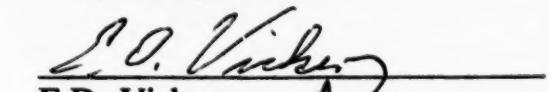
29. 33 U.S.C.A. §908(h).

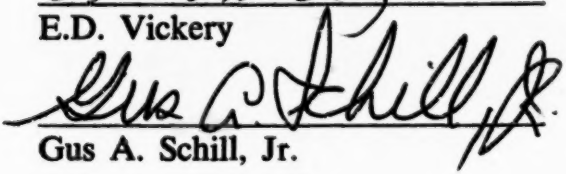
CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,



E.D. Vickery



Gus A. Schill, Jr.

Ben L. Reynolds

Attorneys for Respondents, Atlantic & Gulf Stevedores, Inc., Young & Company of Houston and Texas Employers' Insurance Association

Of Counsel:

ROYSTON, RAYZOR & COOK
877 San Jacinto Building
Houston, Texas 77002

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari have been served upon counsel for Petitioners, Mr. W. Jiles Roberts, 617 Americana Building, Houston, Texas 77002, and upon counsel for the Respondents Gerald B. Leavey and R. J. Shea, Deputy Commissioners, Honorable Erwin N. Griswold, Solicitor General, Department of Justice, Washington, D. C. 20530, Mr. Alfred H. Meyers and Mr. Arthur Bolstein, Attorneys, United States Department of Labor, Washington, D. C. 20530, and Honorable Morton L. Susman, United States Attorney, P. O. Box 61129, Houston, Texas 77061, by depositing two copies to each of them in a United States post office or mail box, with first class postage prepaid, air mail postage prepaid to all out of town addressees, properly addressed to their respective post office addresses as shown above on this the 23rd day of December, 1968.

E. D. Vickery

APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 24082

FREDDIE JOE WELCH and PAUL L. TUGWELL,
Appellants,

versus

GERALD B. LEAVEY, Deputy Commissioner, ET AL,
Appellees.

Appeals from the United States District Court for the Southern District of Texas

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(July 10, 1968)

Before JONES, WISDOM and THORNBERRY, Circuit Judges.

THORNBERRY, Circuit Judge: In these consolidated appeals, two longshoremen challenge the adequacy of the Commissioner's compensation award. 33 U.S.C. §901 *et seq.* The case concerns the procedure that must be followed by the Commissioner in a partial-disability case in computing the impact of the injury on the worker's wage-earning capacity and the findings that must be made.

Appellant Tugwell was injured on July 12, 1958 when he slipped and fell while working on a ship. The Commissioner determined that as a result of the fall Tugwell suffered permanent-partial disability from an injury to the lower back.[1] He received a compensation award of $844.20 for the period from July to November 1, 1958; however, his claim for continuing compensation was denied. It was shown that Tugwell was promoted to a walking foreman after his injury and that his after-injury wages were considerably higher than his pre-injury wages. Based on this fact and the medical testimony, the Commissioner concluded that appellant suffered no economic loss after November 1, 1958. He specifically found that appellant's record of substantially increased earnings and his positively demonstrated ablity to earn higher wages indicated that he suffered no loss of earning capacity after that date.

Appellant Welch's injury occurred on November 24, 1961 when he slipped on some fertilizer and at the same time was struck by a load being swung by a crane which knocked him to the floor. He suffered a back injury from this mishap, but continued to work though he was partially disabled until May 30, 1963. The Commissioner concluded that although Welch was partially and permanently disabled he suffered no loss of earning capacity after May 30, 1963:

> In consideration, therefore, of the claimant's demonstrated ability to earn wages during a substantial period of his disability, which were

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[1]We reach Tugwell's compensation claim because we have determined in a companion case that he is not barred by collateral estoppel from seeking compensation under the Longshoremen's Act. *See Young & Company v. Shea,* 5th Cir. 1968, _____F.2d_____ [No. 24249, _____, 1968]

> equal to or in excess of his average weekly wage prior to his injuries, and considering the degree or percentage of his physical impairment, his usual employment and other factors and circumstances which might affect his capacity to earn wages in his disabled condition, including the effect of such disability as it may naturally be expected to extend into the future, it is determined that the claimant suffered no loss of wage-earning capacity subsequent to May 30, 1963, as a consequence of his injury of November 24, 1961.

Appellants contend that the Commissioner erred in failing to award compensation after these dates. We are convinced, however, that there is substantial evidence to support the holding that although Tugwell and Welch suffered permanent impairments from their injuries, they suffered no disability within the economic purview of the Longshoremen's Act after the dates set by the Commissioner.

In cases of permanent-partial disability, the statute dictates that for non-specific-member loss, the wage-earning capacity of the worker shall be the basis upon which compensation is awarded. Thus 33 U.S.C. §908 (c)(21) is controlling:

> (21) Other Cases: In all other cases in this class of disability (permanent and partial) the compensation shall be 66 2/3 percentum of the difference between his average weekly wages and his wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of such partial disability, but sub-

> ject to reconsideration of the degree of such impairment by the Deputy Commissioner on his own motion or upon application of any party in interest.

The Commissioner determines "wage-earning capacity" by following section 908(h) of the Longshoremen's Act:

> The wage-earning capacity of an injured employee . . . (1) shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity; (2) provided, however, that if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the deputy commissioner may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of the injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition including the effect of disability as it may naturally extend into the future.

It is well settled that this statutory framework commands the Commissioner to translate disability in a medical sense into economic disability within the meaning of the Act. *Williams v. Donovan,* E.D.La. 1964, 234 F.Supp. 135, *aff'd* 367 F.2d 825.

Appellants contend that when the Commissioner found they were partially and permanently disabled, he was required to enter an order providing for permanent compensation payments. Their position is spurious. The Com-

missioner cannot find that permanent physical disability has resulted in permanent economic disability unless he concludes that wage-earning capacity will always be adversely affected by the physical impairment. Stated differently, the statute does not allow an award for permanent-partial disability, aside from scheduled disabilities, unless there has been a loss of wage-earning capacity. This can be seen in the statutory definition of "disability"; "incapacity because of injury to earn [thereafter] the wages which the employee was receiving at the time of injury." 33 U.S.C. §902(10); *Miller v. O'Hearne,* D. Maryland 1960, 181 F.Supp. 105, 107.

Appellant's second attack on the compensation award seems to be that though wage-earning capacity is relevant, the present order is not in accordance with law because the Commissioner employed an improper standard in determining their capacity. They argue that the Commissioner found no decrease in working capacity solely because after-injury wages were higher. As will be seen, it is only to the finding on Tugwell's claim that this objection is pertinent. As to Tugwell, the Commissioner found that as a consequence of his record of substantially increased earnings since November 2, 1958 and in view of his positively demonstrated ability to earn wages in excess of his average weekly wage prior to injury, he sustained no loss of wage-earning capacity after November 1, 1958. Appellants say the Commissioner applied an improper standard under *Burley Welding Works v. Lawson,* 5th Cir. 1944, 141 F.2d 964. There we remarked that an "employee who has sustained a permanent-or temporary-partial disability and who returns to work at the same or higher wages nevertheless may be entitled to compensation if he has sustained a decrease in "wage-earning capacity." *Id.* at 966.

Examination of Section 908(h) confirms that *Burley* is inapposite. The statutory scheme shows that the Commissioner is to base his finding of wage-earning capacity on the employee's subsequent wage record unless he determines that these actual earnings do not fairly and reasonably represent wage-earning capacity. All *Burley* adds to this statutory guideline is that these higher wages are not always determinative. *See California Ship Service Co. v. Pillsbury,* 9th Cir. 1949, 175 F.2d 873, 877; *Bethlehem Steel Company, Shipbuilding Div. v. Traynor,* D. Maryland 1965, 239 F.Supp. 749. The rule-of-thumb for the Commissioner is therefore that "[w]hile the employee's wage-earning capacity is normally determined by his actual earnings, this is by no means necessarily so." *Travelers Insurance Co. v. McLellan,* 2d Cir. 1961, 288 F.2d 250, 251. This rule also comports with the purpose of section 908(h) which is to allow the Commissioner to consider other factors besides subsequent wages in situations where the employee had no actual earnings after injury or his actual earnings did not reflect his capacity. Furthermore, since these wages are clearly the most concrete data in the compensation calculus, there are strong practical reasons for having the Commissioner begin his analysis with them. After examining the record and noting that the Commissioner spoke in terms of "ability to earn wages," we are persuaded that he focused on the capacity issue and merely used the wages as a guideline. We have found only one decision to the effect that the comparison of earnings before and after injury is not particularly significant. There the court was convinced that the injury would adversely affect the worker's future employment possibilities. *See Lawrence v. Norfolk Dredging Co.,* 4th Cir. 1963, 319 F.2d 805. Surely Tugwell's promotion and his increase in salary from $10,790.41 in 1959 to $14,-

926.99 in 1964 negate that possibility here. Appellants' only rebuttal is that if the Commissioner considered post-injury wages reflective of Tugwell's earning capacity, he should have entered a specific finding that these wages were a fair and reasonable indication of this capacity. Because we are convinced that the only reasonable inference which can be drawn from the findings is that the Commissioner considered the actual wages as fairly and reasonably representative of Tugwell's wage-earning capacity, we can find no reversible error in the failure to make findings in the language used by appellants. *Cf. Alexander v. Leavey*, 5th Cir. 1966, 370 F.2d 536, 537.

Finally, the wording of the finding as to Welch renders these arguments about standards for computing capacity inapplicable. The Commissioner considered all the factors enumerated in section 908(h)(2) and clearly held that Welch suffered no loss of wage-earning capacity from his injury.

AFFIRMED.

APPENDIX B

ORDERS ON SEVERAL MOTIONS

7-15-66: While C.A. No's 65-H-760, 841 and 844 have been consolidated under C.A. No. 65-H-760, Motions applicable to each case shall be treated separately for convenience.

Re: C.A. 65-H-760: As this Court finds substantial evidence in the record to support the defendant Deputy Commissioner's compensation Order of 10-13-65, Deft. Commissioner's Motion for Summary Judgment is granted. Plff's motion for judgment is denied. See: *Miller v. O'Hearne,* 181 F.Supp. 105 (D. Md. 1960), Alexander v. Leavey (CA 65-H-231, S.D. Tex. 11-18-65). Deft Stevedore and Comp. Carrier's Motion to dismiss Welch's appeal is moot due to the action taken above.

Re: C.A. 65-H-844: As this Court finds substantial evidence in the record to support the defendant Deputy Commissioner's Comp. Order of 11-4-65, deft Deputy Commissioner's Motion for Summary Judgment is granted. Plff's motion for Summary Judgment is denied. See: *Miller v. O'Hearne, supra, Alexander v. Leavey, supra.* Deft's Stevedore and Comp. Carrier's motion to dismiss Tugwell's appeal is *moot* in view of the granting herein of the defendant Deputy Commissioner's motion for Summary Judgment.

Notice.

J.N."

JAN 2 1969
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

NO. 757

FREDDIE JOE WELCH and PAUL L. TUGWELL,

Petitioners,

v.

GERALD B. LEAVEY, Deputy Commissioner, ET AL,

Respondents.

REPLY BRIEF OF PETITIONERS FREDDIE JOE WELCH AND PAUL L. TUGWELL TO THE BRIEFS OF RESPONDENTS THE DEPUTY COMMISSIONER AND THE EMPLOYERS AND INSURANCE CARRIER

W. JILES ROBERTS

617 Americana Bldg.
Houston, Texas 77002

Attorney for
Petitioners

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REPLY BRIEF OF PETITIONERS FREDDIE JOE WELCH AND PAUL L. TUGWELL

STATEMENT

If the Deputy Commissioner and the employers and insurance carrier correctly stated the questions presented, then this Petition would not have been filed, nor would the proceedings in the district court as well as those in the Fifth Circuit Court of

Appeals been pursued because the cases would have been controlled by the cases cited by Respondent Deputy Commissioner.[1] But this Petition invokes questions properly reviewable by the courts under 33 U.S.C.921(b) printed in Appendix A, page 1a, of this Reply Brief as interpreted by this Court in Norton v. Warner Co., 321 U.S. 565, 569; 64 S.Ct. 747, 750.[2]

REPLY TO RESPONDENTS

The flaw in the arguments of the Deputy Commissioner, the employers, and the insurance carrier is that such

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1 O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359; Voehl v. Indemnity Insurance Co., 288 U.S. 162; Del Vecchio v. Bowers, 296 U.S. 280; Cardillo v. Liberty Mutual Insurance Co., 330 U.S. 469; O'Leary v. Brown-Pacific-Maxon, Inc., 340 U.S. 504; see, also, Owens v. Traynor, 396 F.2d 783 (C.A. 4), certiorari denied, November 25, 1968, No. 529.

2 "Thus it is that the judicial review conferred by § 21 (b) does not give authority to the courts to set aside awards because they are deemed to be against the weight of the evidence. More is required. The error must be one of law, such as the misconstruction of a term of the Act."

arguments fail to take into consideration the Legislative History, pages 38a-47a, particularly pages 44a-46a and cases there cited, in Appendix G of Petitioners' Petition adding the amendment (§ h). The awards seem to have been issued under 33 U.S.C. 908 (21) without regard to the amendment (§ h), and Respondents seek to uphold them under the statute as it existed prior to amendment. These arguments were held to be untenable over thirty (30) years ago by the Court of Appeals for the District of Columbia in Hartford Accident & Indemnity Company v. Hoage, District of Columbia circuit, 85 F.2d 420, and this case was used as an example by the Department of Labor in requesting Congress to amend the statute where the Court of Appeals for the District of Columbia quoted with approval Postal Telegraph Cable Company v. Industrial Accident Commission of California, 3 Pac.2d 6, cited also in the Legislative History:

> "...The right to compensation is not lost or diminished by the injured employee's return to work at the same or a different wage than that theretofore earned by him." (See page 85)

A review of the cases cited in the Legislative History seems to indicate an intention on the part of Congress that the injured employee is to be awarded compensation when he is permanently and partially disabled to his

body as a whole as a result of injury without regard to earnings, the same as the injured employee is to be awarded compensation when he has sustained a disability to a specific member of his body covered under 33 U.S.C. 908(c) 1-19, pages 26a through 29a, of Appendix D of the Petition.

Any other construction seems to place an unrealistic approach on the intent of Congress to compensate the injured employee for injuries to the body as a whole as distinguished from compensation to be awarded for injuries to specific members of the body and for disfigurement. It is difficult for the undersigned to visualize Congress on one hand allowing compensation for permanent partial incapacity for an injury to a specific member of the injured employee's body, resulting in no loss of earnings and at the same time not to require compensation be paid for an injury to the body generally for permanent partial disability, especially in view of the Legislative History, supra.

While there is a view of Ennis v. O'Hearne, 223 F.2d 755, Fourth Circuit, which might be construed as involving only the substantial evidence rule, consideration of background of the case of necessity shows that it stands for the proposition that where the injured employee has sustained some permanent partial disability, he is to be awarded compensation, otherwise the case should have been affirmed under the substantial

evidence rule referred to, supra. (There was testimony showing he had no more than ten per cent [10%] disability to the body as a whole. Petitioner Welch has been determined to have five per cent [5%] to ten per cent [10%], and Petitioner Tugwell, twenty per cent [20%].)

In Travelers Insurance Company v. McClellan, 288 F.2d 250, cited by Petitioners, upon further reflection it is conceded not to be a conflicting decision by another circuit because the Deputy Commissioner made findings of fact as to the fact that the injured employee's actual earnings did not fairly represent his wage earning capacity. (In this case, no findings are made as to whether the wages earned fairly represented Petitioners' wage earning capacity, and attention is called to the findings in Travelers, supra, pertaining to basic pay wages on the job, general increases of the industry, etc., all present in practically every case today because of improvements in technology, inflation, et cetera.)

Petitioners contend, at the very least, the Deputy Commissioner was required to find whether or not the wages subsequent to date of injury fairly and reasonably represented the injured employees' wage earning capacity. In Petitioners' case, the Fifth Circuit has effectively ruled that such findings are not required to be made specifically but that they may be made inferentially.

Not only is this contrary to Automatic Canteen Company v. Federal Trade Commission, 73 S.Ct. 1017, 1028; 346 U.S. 61, 81, cited on pages 6 and 9 of Petitioners' Petition, but the difficulty with this view of the law is that it is impossible for anyone to actually determine whether or not the Deputy Commissioner was proceeding on a correct view of the law because his findings are not definite enough for the courts to say whether or not he considered Petitioners' wages after injury definitely to fairly and reasonably represent their capacity to work and earn money.

CONCLUSION

Therefore, since the Legislative History indicates an intention on the part of Congress to award compensation for injuries to the body generally, in line with compensation allowed for injuries resulting in disability to specific members of the body as well as disfigurement, and further indicates a rejection of Respondents' positions, and in any event requires a finding under the facts of these cases as to whether or not the earnings of Petitioners fairly and reasonably represent their respective abilities to work and earn money as compared to their ability previous to injury to work and earn money; since the rulings below are in conflict of necessity with Ennis v. O'Hearne, supra and page 6 of Petition; since the

findings by the Deputy Commissioner are not adequate as judged by Automatic Canteen Company, supra; and since this represents an important question of federal law probably decided differently from how this Court would decide same, Petitioners pray that the Petition be granted and the Court issue appropriate instructions to the courts and Deputy Commissioner below.

Respectfully submitted,

(Original Signed) W. JILES ROBERTS

W. JILES ROBERTS
617 Americana Building
Houston, Texas 77002
713, 223-4601

Attorney for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that two (2) copies of the foregoing Reply Brief have been served upon each of the following: Solicitor General, Department of Justice, Washington, D. C. 20530, and upon Mr. Charles Donahue, Solicitor of Labor, Washington, D. C., 20530, each by depositing two (2) copies thereof in a United States Post Office or mailbox addressed to their Post Office address, Airmail, postage prepaid, and upon Mr. Morton Sussman, United States

Attorney, 515 Rusk Avenue, Houston, Texas 77002, counsel for Respondent, Gerald B. Leavey, Deputy Commissioner; Royston, Rayzor & Cook, 877 San Jacinto Building, Houston, Texas 77002, counsel for Respondents Texas Employers' Insurance Association and Atlantic & Gulf Stevedores, Inc., and Young & Company of Houston, by depositing in a United States Post Office or mailbox the same to each of them, United States Mail, postage prepaid, properly addressed to each of them at their respective Post Office addresses, this the 30th day of December, 1968.

(Original Signed) W. JILES ROBERTS

W. JILES ROBERTS

APPENDIX A

33 U.S.C. 921 Review of compensation orders

(b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injuction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred (or in the United States District Court for the District of Columbia if the injury occurred in the District). The orders, writs, and processes of the court in such proceedings may run, be served, and be returnable anywhere in the United States. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless upon application for an interlocutory injunction the court, on hearing, after not less than three days' notice to the parties in interest and the deputy commissioner, allows the stay of such payments, in whole or in part, where irreparable damage would otherwise ensue to the employer. The order of the court allowing any such stay, shall contain a specific finding, based upon evidence submitted to the court and identified by reference thereto, that such irreparable damage would result to the employer, and specifying the nature of the damage.